Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1545

AMSTAR CORPORATION,
Petitioner,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY OF TEXAS AND LOUISIANA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Harry McCall, Jr.
David R. Richardson
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

Attorneys for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

Page

TABLE OF AUTHORITIES ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

QUESTIONS PRESENTED ..... 2

STATUTORY PROVISION INVOLVED ..... 3

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 5

I. The decision below conflicts with prior decisions of this Court ..... 5

II. The decision below conflicts with decisions of other Circuits and with a prior decision of the Court of Appeals for the Fifth Circuit ..... 6

III. The decision below is clearly erroneous ..... 7

CONCLUSION ..... 9

CERTIFICATE OF SERVICE ..... 9

APPENDIX ..... 1a

# TABLE OF AUTHORITIES

Page

*Aetna Cas. & Sur. Co. v. Cunningham*, 224 F.2d 478 (5th Cir. 1955) ..... 7

*Cruz v. Pacific American Ins. Corp.*, 337 F.2d 746 (9th Cir. 1964) ..... 6

*di Leo v. Greenfield*, 541 F.2d 949 (2d Cir. 1976) ....6,7

*Gadsden v. Fripp*, 330 F.2d 545 (4th Cir. 1964) .....6

*Gore Products, Inc. v. Texas & N.O.R. Co.*, 34 So.2d 418 (La. App. 1948) ..... 3

*Nashville, Chattanooga & St. Louis R. Co. v. United States*, 113 U.S. 261 (1895) .....5,8

*Pacific R. Co. of Missouri v. Ketchum*, 101 U.S. (11 Otto) 289 (1880) .....5,8

*Swift & Co. v. United States*, 276 U.S. 311 (1928) ... 5,8

*United States for the Use and Benefit of H & S Industries v. Rich*, 525 F.2d 760 (7th Cir. 1975) ..... 6

*United States v. Hougham*, 364 U.S. 310 (1960) ..... 5,6

*White & Yarborough v. Dailey*, 228 F.2d 836 (5th Cir. 1955) .....4,6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

---

No.

---

AMSTAR CORPORATION,
Petitioner,

versus

SOUTHERN PACIFIC TRANSPORT
COMPANY OF TEXAS AND LOUISIANA,
Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioner Amstar Corporation prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 607 F.2d 1100 and is reprinted in the Appendix hereto

pp. 36a-37a infra. The District Court for the Eastern District of Louisiana did not render an opinion; the consent judgment signed by that Court is reprinted here in the Appendix hereto at pp. 26a-28a (hereinafter referred to as "App").

## JURISDICTION

The judgment of the Court of Appeals was rendered on December 3, 1979. However, Petitioner did not receive notice of the judgment and only learned of its rendition when counsel received a bill of costs from the Court of Appeals for the Fifth Circuit on December 28, 1979, at which point timely application for rehearing was no longer possible. Accordingly, on January 3, 1980, Petitioner moved for leave to file Petition for Rehearing Out of Time. This motion was denied on January 21, 1980(App pp. 40a-41a). On February 22, 1980, petitioner filed for and was granted an Extension of Time For Filing Petition For Certiorari. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The basis of jurisdiction in the District Court was 49 U.S.C. §§1 *et seq.*

## QUESTIONS PRESENTED

Whether by entering into a consent judgment that specifically reserves the right to appeal the measure of damages, a party is precluded from appealing that issue.

## STATUTORY PROVISION INVOLVED

28 U.S.C. Section 1291, provides that:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

Petitioner, a sugar refiner, filed suit under 49 U.S.C. §20 ¶ 11 against Respondent, a common carrier by truck, for damage done to a cargo of sugar consigned to Respondent for transport. Respondent denied liability, but the true controversy was as to the amount which would be due Petitioner in the event of a favorable judgment. Petitioner contended on authority of *Gore Products, Inc. v. Texas & N.O.R. Co.*, 34 So.2d 418 (La. App. 1948) that the proper measure of damages was the amount of profit lost by Petitioner on the completed sale, $7,529.28. Respondent contended that the proper measure was the cost of reprocessing the sugar for resale to another customer, $488.65.[1]

---

1 There is no dispute between the parties as to these amounts.

In order to limit its possible liability to the lower figure, Respondent moved for partial summary judgment only on the issue of quantum of damages. The motion was granted, leaving the parties with the prospect of a trial on liability with less than five hundred dollars at stake. Amstar believed the partial summary judgment to be in error but could not appeal this interlocutory decree. Accordingly, after a pre-trial conference, opposing counsel agreed to enter into a Consent Judgment Upon Joint Stipulation of Facts (App pp. 26a-28a). The final paragraph of this judgment reads as follows:

> "(6) This judgment is rendered in recognition of the reservation by plaintiff of its right to prosecute an appeal in this action in connection with this judgment and in connection with the partial summary judgment rendered on March 14, 1979."

Thereafter, Amstar appealed to the United States Court of Appeals for the Fifth Circuit. Both parties' briefs were devoted exclusively to the substantive law at issue, for it had been agreed and understood that Amstar had reserved its right to appeal the measure of damages, the only issue that was ever genuinely contested. While recognizing that the consent judgment reserved Amstar's right to appeal, the Court of Appeals held that the fact that "both parties freely consented to the entry of a final judgment precludes an appeal from it," citing *White & Yarborough v. Dailey*, 228 F.2d 836 (5th Cir. 1955) (per curiam).

Petitioner did not receive timely notice of the dismissal and thus could not petition timely for rehearing. Petitioner's Motion for Leave to File Petition for Rehearing Out of Time was denied, and application was made to this Court for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### I. The decision below conflicts with prior decisions of this Court.

The decision below conflicts with this Court's decisions in *Swift & Co. v. United States*, 276 U.S. 311, 72 L.Ed. 587 (1928), *Nashville, Chattanooga & St. Louis R. Co. v. United States*, 113 U.S. 261, 28 L.Ed. 971 (1895), and *Pacific R. Co. of Missouri v. Ketchum*, 101 U.S. (11 Otto) 289, 25 L.Ed. 932 (1880), on the issue of appealability of consent judgments. In all three cases cited above, a party sought to appeal a consent judgment, and in each case this Court reviewed the judgments. As the Court said in *Swift*, "Decrees entered by consent have been reviewed upon appeal when there was a claim of lack of actual consent to the decree as entered." 276 U.S. at 311, 2 L.Ed. at 596. In the present case, it is apparent on the record that no consent was ever given on the issue of quantum. In fact, the record shows on its face that both parties understood that Petitioner had reserved its right to appeal that question.

The decision below also conflicts with this Court's decision in *United States v. Hougham*, 364 U.S. 310, 5 L.Ed.2d 310 (1960), on the issue of appealability of

judgments from which a party has accepted benefit. Though the Court of Appeals did not explicitly set out the benefit theory as a ground for dismissal, its citation of *White & Yarborough v. Dailey*, 228 F.2d 836 (5th Cir. 1955), which rested in part on this theory, suggests that Petitioner's acceptance of $488.65 pursuant to the consent judgment may have been crucial to the Court's dismissal of its appeal. Any reliance on *White & Yarborough* is misplaced, for as this Court pointed out in *Hougham, supra,*

> It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are insufficient, acceptance of payment of the unsatisfactory judgment, does not, standing alone, amount to accord and satisfaction of the entire claim. 364 U.S. 312, 5 L.Ed.2d at 12.

## II. The decision below conflicts with decisions of other circuits and with a prior decision of the Court of Appeals for the Fifth Circuit.

The Court of Appeals' decision, insofar as it rests upon Petitioner's acceptance of benefits, conflicts with decisions of other Courts of Appeal. *di Leo v. Greenfield*, 541 F.2d 949 (2d Cir. 1976); *United States For the Use and Benefit of H & S Industries v. Rich*, 525 F.2d 760 (7th Cir. 1975); *Cruz v. Pacific American Ins. Corp.*, 337 F.2d 746 (9th Cir. 1964); *Gadsden v. Fripp*, 330 F.2d 545 (4th Cir. 1964).

In the last three cited cases, parties accepted the benefits of unsatisfactory judgments and appealed the awards, praying for an increase in quantum. Appellees in each case sought dismissal of the appeal on grounds that the acceptance of benefits of judgment foreclosed appeal, and in each case, the appellate court heard the appeal. The first-cited case, *di Leo*, while affirming the same principle, is different in that appellant, having accepted a monetary judgment, sought, and was allowed, to appeal the constitutionality of a statute that had been used to justify his firing.

The Court of Appeals' decision, insofar as it rests upon Petitioner's acceptance of benefits, also conflicts with the Fifth Circuit Court of Appeals' prior decision in *Aetna Cas. & Sur. Co. v. Cunningham*, 224 F.2d 478 (5th Cir. 1955). In this case, the Court heard the appeal of a plaintiff who had recovered the full sum sought below and appealed solely from a finding that defendant had not been guilty of fraud.

## III. The decision below is clearly erroneous.

The decision of the Court of Appeals for the Fifth Circuit rests on "both parties [having] freely consented to the entry of a final judgment . . . ." Certainly both parties *did* so consent, but the judgment consented to expressly reserved in Amstar "the right to prosecute an appeal in this action in connection with this judgment and in connection with the partial summary judgment

rendered on March 14, 1979." This reservation was repeated in the Joint Motion For Approval of Consent Judgment and in the Satisfaction of Judgment signed by Amstar. Without these reservations, Amstar would never have consented to entry of judgment. In dismissing the Amstar's appeal for the reason given, the Court below in effect amended the consent judgment, thereby vitiating Amstar's consent.

As this Court pointed out in *Swift & Co. v. United States, supra, Nashville, Chattanooga & St. Louis R. Co. v. United States, supra,* and *Pacific R. Co. of Missouri v. Ketchum, supra,* a consent judgment is appealable when the fact of consent is called into question, as it is here on the face of Amstar's pleadings and on the face of the opinion of the Court of Appeals. The issue of damages is the only issue in this case that was ever in genuine controversy, and it remained in controversy after the signing of the Consent Judgment. Neither party ever contemplated that the signing of that judgment foreclosed Amstar's right to appeal; in ruling as it did, the Court of Appeals rewrote the consent judgment and deprived Amstar of the appeal granted by Congress as a matter of right under 28 U.S.C. Section 1291.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal for the Fifth Circuit.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

---

HARRY McCALL, JR.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this ____day of March, 1980, three copies of this Petition for Writ of Certiorari were hand delivered by undersigned counsel to Warren M. Schultz, Jr. of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 28th Floor, 225 Baronne, New Orleans, Louisiana, counsel for Respondent.

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

---

HARRY McCALL, JR.
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

AMSTAR CORPORATION

versus

No. 77-900
SECTION I

SOUTHERN PACIFIC TRANSPORT
COMPANY OF TEXAS AND LOUISIANA

Filed: Mar. 23, 1977 _____

DEPUTY CLERK

*COMPLAINT*

The complaint of Amstar Corporation, a common carrier by rail, qualified to do and doing business in the State of Louisiana with respect represents:

1.

This claim arises under the Interstate Commerce Act, 49 U.S.C. Section 1 et seq., and particularly under 49 U.S.C. Section 20, ¶ 11.

2.

Defendant, Southern Pacific Transport Company of Texas and Louisiana is a foreign corporation.

3.

During December, 1974, plaintiff shipped 390 one hundred pound bags of sugar from Three Oaks,

Louisiana and consigned to White Swan Instant Foods at Farmers Branch, Texas on standard form bills of lading.

4.

Three hundred forty-one (341) bags of sugar were returned to Chalmette, Louisiana because they were wet and were forced to be reprocessed.

5.

The sugar was not wet when it left the refinery as the truck weight record and weigh ticket indicate the net weight of the sugar was 40,200 pounds. The 40,200 pounds consisted of 39,900 pounds for the 399 one hundred pound bags, and 300 pounds for the tare weight of the bags at approximately 1 pound for each bag.

6.

The value of the 341 bags of sugar was $23,034.55. The value of the raw sugar reprocessed in Chalmette was $15,505.27. The difference is the amount of injury to the plaintiff and amounts to $7,529.28.

7.

This damage is overdue and remains unpaid despite repeated amicable demand.

WHEREFORE, plaintiff, Amstar Corporation, demands judgment against defendant, Southern Pacific

Transport Company of Texas and Louisiana in the full sum of SEVEN THOUSAND FIVE HUNDRED TWENTY-NINE AND 28/100 ($7,529.28) DOLLARS plus interest and costs.

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

/s/ Frank Liberto
Peter Frank Liberto
Attorneys for Amstar
Corporation
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: 568-1320

PLEASE SERVE:

HARRY McCALL, JR.
Agent for Service of Process
1500 First N.B.C. Building
New Orleans, Louisiana 70112

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: _____

*ANSWER*

The Answer of Southern Pacific Transport Company of Texas and Louisiana, named defendant in the above entitled and numbered action, to the Complaint of Amstar Corporation, with respect represents:

*FIRST DEFENSE*

The Complaint fails to state a claim against defendant upon which relief can be granted.

*SECOND DEFENSE*

Answering by paragraphs the allegations of plaintiff's Complaint, defendant responds as follows:

I

Defendant admits the allegations of Paragraph 1 of plaintiff's Complaint.

II

Defendant admits the allegations of Paragraph 2 of plaintiff's Complaint.

III

Defendant denies the allegations of Paragraph 3 of plaintiff's Complaint, except to admit that during December, 1974, plaintiff shipped sugar from Three Oaks, Louisiana, to Farmers Branch, Texas.

IV

Defendant denies the allegations of Paragraph 4 of plaintiff's Complaint, except to admit that all of the sugar shipped as described in Paragraph III, above, was not accepted by the consignee and was returned to the shipper, Amstar Corporation.

V

Defendant denies the allegations of Paragraph 5 of plaintiff's Complaint, except to admit that the truck weight record and weigh ticket indicate the net weight of the sugar shipped as described in Paragraph III, above, was 40,200 pounds.

VI

Defendant denies the allegations of Paragraph 6 of plaintiff's Complaint.

VII

Defendant denies the allegations of Paragraph 7 of plaintiff's Complaint.

*THIRD DEFENSE*

Any shipment which forms the basis for plaintiff's Complaint was made pursuant to a uniform bill of lading and all applicable tariffs on file with the Interstate Commerce Commission, and defendant is liable for loss or damage to property shipped pursuant thereto only in accordance with the terms and conditions of the said bill of lading and tariffs. The said bill of lading and tariffs are the best evidence of their terms, conditions, and all other matters contained therein, and defendant specifically pleads the said bill of lading and tariffs in complete defense to the claims asserted herein, as if the said bill of lading and tariffs were copied in extenso herein.

*FOURTH DEFENSE*

Defendant avers that any damages to plaintiff were caused by the acts or defaults of the shipper, Amstar Corporation, in that the property was improperly packaged and/or loaded onto the trailer, and defendant therefore is not liable for any said damage.

*FIFTH DEFENSE*

Alternatively, in the event it is found by the court that defendant is liable for any damage to sugar shipped by plaintiff, defendant avers that it is liable only for the cost of reprocessing the said sugar.

WHEREFORE, defendant, Southern Pacific Transport Company of Texas and Louisiana, prays that after due proceedings had, there be judgment herein dismissing plaintiff's suit at its cost.

---

RAYMOND J. SALASSI, JR. and
WARREN M. SCHULTZ, JR. of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street — 18th Floor
New Orleans, Louisiana 70112
Telephone: 581-6641
Attorneys for Defendant

*CERTIFICATE*

I do hereby certify that a copy of the above and foregoing Answer has been served on all counsel of record by placing same in the United States Mail, postage prepaid and properly addressed, this ____ day of _____, 1977.

---

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: _____

*MOTION FOR PARTIAL SUMMARY JUDGMENT*

NOW INTO COURT, through undersigned counsel, comes Southern Pacific Transport Company of Texas and Louisiana, defendant in the above entitled and numbered action, and respectfully moves the Court to enter a partial summary judgment for the defendant, on the issue of damages, in accordance with the provisions of Rule 56(b) and (c) of the rules of Civil Procedure, on the grounds that the pleadings on file and the concise statement of material facts as to which there is no genuine issue to be tried, hereto attached, show that there is no genuine issue of material fact with respect to the issue of damages, and the defendant, Southern Pacific Transport Company of Texas and Louisiana, is entitled to judgment as a matter of law.

WHEREFORE, Southern Pacific Transport Company of Texas and Louisiana prays that a partial summary judgment be entered in its favor specifying that if the plaintiff should prevail at the time of trial on the issue of liability, then the amount of damages recoverable by the plaintiff from the defendant in this action

amounts to the sum of Four Hundred Eighty Eight and 65/100 ($488.65) Dollars.

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR. And
RAYMOND J. SALASSI, JR. of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street —
18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorneys for Southern Pacific
Transport Company of
Texas and Louisiana

*CERTIFICATE*

Undersigned counsel hereby certifies that a copy of the above and foregoing Motion for Partial Summary Judgment has been forwarded to all counsel of record to this proceeding by placing a copy of same in the United States Mail, postage prepaid and properly addressed this 13th day of February, 1979.

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

*MEMORANDUM ON BEHALF OF SOUTHERN PACIFIC IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT*

MAY IT PLEASE THE COURT:

This lawsuit was instituted by Amstar Corporation ("Amstar"), as shipper, against Southern Pacific Transport Company of Texas and Louisiana ("Southern Pacific"), as carrier, to recover for alleged damage in transit to sugar manufactured and shipped by Amstar. The sugar was shipped by Amstar to White Swan Instant Foods pursuant to a contract of sale between Amstar and White Swan. White Swan refused to accept delivery of the sugar on the grounds that some of the sugar was wet and some of the bags were torn. The sugar was returned to Amstar's plant, where it was reprocessed at a cost of $488.65 and subsequently resold in the ordinary course of business. On the same day that the sugar was returned, Amstar shipped a duplicate shipment to White Swan at the same price as the original shipment. Amstar incurred no other costs in connection with its replacement of the allegedly damaged sugar. Amstar contends that it is entitled to recover the profits, amounting to the sum of $7,529.28, that it would have realized on the sale of the first shipment of sugar to White Swan, notwithstanding the fact

that it realized the same amount of profit on the duplicate shipment to White Swan. This memorandum is submitted on behalf of Southern Pacific in support of its Motion for Partial Summary Judgment, which is to the effect that the reprocessing costs represent the proper measure of the full, actual loss, damage, or injury to Amstar in this particular case.

The question of liability in this case cannot be disposed of in a summary manner since material facts are in dispute with respect to that issue. Nevertheless, in the event that liability should be imposed upon Southern Pacific, there is no dispute as to the material facts with respect to the measure of damages, and Southern Pacific urges the Court to dispose of that issue pursuant to this motion.

In short, there is no justification for Amstar to recover any damages other than reprocessing costs where Amstar realized its full measure of profits in connection with its sale to White Swan and where the allegedly damaged sugar was reprocessed and sold by Amstar in its ordinary and regular course of business. To allow a greater recovery would put Amstar in a better position than it would have been if no sugar had been damaged.

The Interstate Commerce Act provides that the measure of damages for any damage to goods caused by a common carrier shall be the "full, actual loss, damage

or injury. . . ." 49 U.S.C.A. §20(11). This provision of the Interstate Commerce Act is applicable to motor carriers under the Motor Carriers Act. 49 U.S.C.A. §319. *See Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978).

As a general rule, the measure of damage in freight damage claims is the difference between the market value of the goods at their destination in an undamaged condition and the market value of the goods at destination in the condition in which they arrived. Where this measure of damages does not reflect the claimant's actual loss, however, the courts have made it clear that some other measure must be adopted. As stated by the Fifth Circuit Court of Appeals, ". . . recovery should be based upon this difference in market values, but not exceed indemnity." *Missouri Pacific R.R. v. H. Rouw Co.*, 258 F.2d 445, 448-49 (5th Cir. 1958). Accordingly, whatever measure of damages is used, it must not exceed that amount that will indemnify Amstar for its full, actual loss. Stated otherwise, Amstar is entitled to recover only that sum of money that will put it in the position it would have occupied if the carrier had fully performed under the contract of carriage.

In this case, Amstar suffered no loss of profits in connection with its sale to White Swan. A duplicate shipment was made on the same day that the original shipment was refused by White Swan. The terms and con-

ditions of the two shipments were identical, and no additional freight charges were incurred. Further, Amstar was able to reprocess the returned sugar and resell it in its ordinary and regular course of business. In that sense, the value to Amstar of the allegedly damaged sugar was $488.65 less than the value to Amstar of an equivalent amount of undamaged sugar. That is true because Amstar was able to restore the sugar to an undamaged state at a cost of $488.65. In another sense, by recovering the sum of $488.65, Amstar would be put in the same position that it would have occupied if no sugar had ever been damaged. Consequently, to permit Amstar to recover any amount in excess of the reprocessing costs would permit Amstar to recover more than indemnity and violate the Fifth Circuit rule in *Missouri Pacific R.R. v. H. Rouw Co., supra.*

Other courts have held that the manufacturer's repair costs represent the proper measure of damages in cases where the shipment was refused by the consignee. For example, in *Process Equipment Co. v. Denver Chicago Trucking Co.*, 275 F.Supp. 698 (D. Mass. 1967), the manufacturer-shipper sold goods to the consignee, and those goods were damaged in transit. The consignee refused the shipment, and the goods were returned to the shipper. The shipper repaired the goods and brought suit against the carrier for damages. The court held that under the circumstances the manufacturer-shipper was entitled to recover only the direct repair costs, as well as some, but not all, indirect repair costs. It is respectfully submitted that the same measure of damages is applicable in this case.

The plaintiff has stated its intention to rely upon the case of *Gore Products, Inc. v. Texas and N.R. Co.*, 34 So.2d 418 (La. App. Orl. 1948), in support of its contention that it is entitled to recover the amount of profits included in the sales price of the first shipment of allegedly damaged sugar. It is respectfully submitted that the *Gore Products* case is inapplicable to the present set of facts for two reasons: first, the *Gore Products* case deals with goods lost in shipment, rather than goods damaged in shipment; and second, *Gore Products* holds that the proper measure of damages in a case of lost goods is the value of the goods, and the case does not even suggest that lost profits is the proper measure of recovery.

In *Gore Products,* the manufacturer-shipper had sold the goods to the consignee and collected the purchase price prior to turning the goods over to the carrier. The goods were lost in transit, and the manufacturer-shipper submitted a claim for the full sales price. The court held that the sales price was the proper measure of recovery, notwithstanding the fact that the sales price included a certain amount for profit to the manufacturer-shipper. The court stated that to hold otherwise, on the assumption that the manufacturer could realize its profits by making a duplicate shipment to the consignee, would mean that the carrier could continue to lose the duplicate shipments and thereby perpetually compel the manufacturer to supply its goods to the carrier at the manufacturer's cost.

The underlying principle in the *Gore Products* decision is, therefore, that once a manufacturer has sold a particular item to a consignee, the manufacturer cannot be deprived of the profits from the sale of that particular item as a result of the fault of the carrier. Even though the manufacturer may be able to ship another item to the consignee and thereby realize its profits on that particular sale, the manufacturer still would not ever be able to realize any profits from the item lost by the carrier. Accordingly, under *Gore Products*, that loss of profits represents actual loss to the shipper and can be recovered under the Interstate Commerce Act, at least where the sales price is deemed to be the proper measure of damage.

It is unnecessary to decide whether the analysis in *Gore Products* is correct, because it is inapplicable here. Amstar has not lost any profits. No goods were lost, the allegations being only that some goods were damaged. By virtue of the duplicate shipment, Amstar realized its full measure of profits on the shipment in question to White Swan, and by virtue of the reprocessing of the allegedly damaged sugar, Amstar was able to resell those goods in its ordinary course of business and to realize its full measure of profits with respect to those goods. Therefore, if Amstar is permitted to recover on the basis of its profits, Amstar would receive more profits than it would have received if no sugar had ever been damaged in the first place. Such recovery would violate the Fifth Circuit's rule against recovery in excess of indemnity as set forth in *Missouri Pacific R.R. v. H.*

*Rouw Co., supra,* and would fail to take account of Amstar's obligation to mitigate its damages.

For all of the foregoing reasons, it is respectfully urged that this Honorable Court grant the Motion for Partial Summary Judgment filed on behalf of the defendant, Southern Pacific Transport Company of Texas and Louisiana.

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR. and
RAYMOND J. SALASSI, JR. of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street — 18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorneys for Southern Pacific
Transport Company of
Texas and Louisiana

*CERTIFICATE*

Undersigned counsel hereby certifies that a copy of the above and foregoing Memorandum in Support has been forwarded to all counsel of record to this proceeding by placing a copy of same in the United States Mail, postage prepaid and properly addressed on this 13th day of February, 1979.

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

*CONCISE STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED*

NOW INTO COURT, through undersigned counsel, comes Southern Pacific Transport Company of Texas and Louisiana, defendant in the above entitled and numbered action, and in connection with its Motion for Partial Summary Judgment submits the following concise statement of material facts with respect to the issue of damages as to which it contends there is no genuine issue to be tried:

I.

On or about December 5, 1974, Amstar Corporation (hereinafter referred to as "Amstar") shipped a shipment of sugar from Three Oaks, Louisiana, to White Swan Instant Foods at Farmers Branch, Texas.

II.

Southern Pacific Transport of Texas and Louisiana (hereinafter referred to as "Southern Pacific") was the carrier in connection with the shipment of sugar.

III.

Southern Pacific tendered delivery of the shipment of sugar to White Swan Institutional on or about December 6, 1974. White Swan Instant Foods refused to accept delivery, however, on the grounds that the shipment included too much wet sugar and torn bags.

IV.

On the same day, December 6, 1974, Amstar shipped a duplicate shipment of sugar, with Southern Pacific as the carrier, to replace the shipment that had been refused by White Swan Instant Foods.

V.

Amstar charged and was paid the same price on the second shipment as it would have realized on the first shipment if White Swan Instant Foods had not refused to accept delivery. No additional freight charges were incurred in connection with the second shipment.

VI.

The first shipment of sugar, which had been refused by White Swan Instant Foods, was returned by Southern Pacific to Amstar.

VII.

Amstar elected to reprocess the returned shipment of sugar, and the total cost to reprocess amounted to the sum of $488.65.

VIII.

The reprocessed sugar was sold by Amstar in its ordinary and regular course of business.

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR. and
RAYMOND J. SALASSI, JR. of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street —
18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorneys for Southern Pacific
Transport Company of
Texas and Louisiana

*CERTIFICATE*

Undersigned counsel hereby certifies that a copy of the above and foregoing Concise Statement has been forwarded to all counsel of record to this proceeding by placing a copy of same in the United States Mail, postage prepaid and properly addressed on this 13th day of February, 1979.

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: Mar. 5, 1979

*MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT ON BEHALF OF AMSTAR CORPORATION*

MAY IT PLEASE THE COURT:

Defendant, Southern Pacific Transport Company of Texas and Louisiana (hereinafter Southern Pacific), has filed this Motion for Partial Summary Judgment contending that the proper measure of damages as regards Amstar Corporation's (hereinafter Amstar) loss is solely the costs of reprocessing the sugar damaged in transit. The basis for this contention is that Amstar realized its full measure of profits in connection with the sale. This contention is totally without basis, Amstar having lost the profit in connection with this particular sale.

The law on this subject was settled in the case of *Gore Products, Inc. v. Texas & N.O.R. Co.*, 34 So.2d 418 (La. App. 1948). There the court specifically held that a shipper is entitled to recover its profits against a carrier for lost or damaged goods shipped under a contract of sale, even though the goods are subsequently replaced by the shipper. The court's realistic reasoning is that the ship-

per would have "earned" his profit if the carrier had fulfilled its obligation to deliver the goods in an undamaged condition.

> "It is true that plaintiff delivered to the carrier a carboy of medicine to substitute for the one which was destroyed, but we do not think that the defendant's liability should be fixed at the amount required to reimburse plaintiff merely for the cost of manufacturing one carboy of medicine. What would be the situation if the second carboy had been lost, or even a third or fourth? Could plaintiff be required to continue to manufacture goods for the defendant at cost?"

Mr. McKnight, in his leading treatise on freight claims, "Law of Freight Loss and Damage Claims" (Third Ed. 1967), discusses the 1946 case of *Meletio Sea Food Co., Inc. v. Gordons Transports, Inc.*, 191 S.W.2d 983, which decision takes a contrary view. However, Mr. McKnight criticizes the *Meletio* decision as not being in accord with the general rules and sound logic, in the following terms:

> "If the foregoing decision is accepted in its literal sense, a manufacturer could be forced to operate its plants for months without any profit whatever in order to replace at cost goods lost or damaged by a carrier, and conceivably the manufacturer could be forced into bankruptcy while operating its facilities

for the benefit of carriers. *The law certainly never contemplated a result of this nature and the aforementioned decision is contrary to the general law on this subject.*" (Emphasis added).

The case of *H. Daroff & Sons, Inc. v. Strickland Transportation Co. Inc.*, 284 F.Supp. 510 (E.D. Pa. 1968), has recently been cited in some trade journals as some authority for the proposition that profit should not be included as part of a claim for a replaced shipment. However, the *Daroff* case does not stand for this proposition. As a matter of fact, it cites the *Gore Products* decision and other authorities to the effect that the shipper should be entitled to recover the market price or contract price. This is set forth at page 513 of the decision, as follows:

> "The relevant language of Title 49 U.S.C.A. §20(11) is that the '* * * common carrier * * * shall be liable * * * for the full actual loss * * * .' Courts interpreting this language have held generally that the shipper is entitled to the market value of the goods as determined at the point of destination at the time delivery should have been made. See generally, Chicago, Milwaukee & St. Paul Railway Co. v. McCaull-Dinsmore Co., 253 U.S. 97, 99-100, 40 S.Ct. 504, 64 L.Ed. 801, and Gore Products v. Texas & N.O.R. Co., 34 So.2d 418, 422 (La. App., 1948). The contract price may be used for determining the market price, See Meletio Sea Food Co., Inc. v. Gordons Transports,

> Inc., 191 S.W.2d 983, 985 (Mo. App. 1946), and in view of the difficulty in establishing market value, is the best standard here for assessing the plaintiff's damages. See also United States v. Northern Pac. Ry. Co., 116 F.Supp. 277, 279 (Minn., 1953)."

This decision was referred to in the 1970 case of *F. S. McCarty Co., Inc. v. Southern Pacific Company*, 428 F.2d 690 (9th Cir.) as authority that the "contract price may well be a better measure of computing the 'full actual loss' as prescribed by 49 U.S.C. §20(11) then a speculative, hypothetical market value."

It is interesting to note that the above view is supported by the recent case of *Polaroid Corporation v. Schuster's Espress, Inc.*, 484 F.2d 349 (1973). The Court discussed the applicable rule as follows:

> "As to the proper measure of damages, courts have generally held that 'full actual loss' under 49 U.S.C. §20(11) is equivalent to market value at destination. See Chicago, M. & St. P.R.V. McCaull-Dinsmore Co., 352 U.S. 97, 40 S.Ct. 504, 64 L.Ed. 801 (1920) and Gore Products v. Texas & N.O.R., 34 So.2d 418 (La. App. 1948). There is some authority for limiting recovery to replacement cost where a manufacturer ships substituted goods to his buyer. Meletio Sea Food Co. v. Gordons' Transports, 191 S.W.2d 982 (Mo. App. 1946).

> *However, mere replacement costs deprive a manufacturer of expected profit which he is on the verge of earning and do not compensate him for what he 'would have had if the contract [of delivery] had been performed . . .', the test enunciated by the Supreme Court.* McCaull-Dinsmore, supra, 253 U.S. at 100, 40 S.Ct. at 505." (Emphasis added).

Therefore, the case of *Polaroid Corporation v. Long Island Delivery Service Co.,* Federal Carrier Cases (U.S.D.C., E.D.N.Y., 1971), Para, 82,254, cannot be considered as well reasoned authority.

Accordingly, the *Gore* decision represents the well settled concept for measuring damages in this area. It is obvious, of course, that a shipper is entitled to be placed in the same position as if the contract had been performed. *Albion Elevator Co. v. Chicago & N.W. Transportation Co.,* 254 N.W.2d 6 (Iowa 1977). Dozens of cases state that the measure is the common law rule: value at the destination at the time the goods should have arrived less the value of the damaged goods.

A variation of the common law rule is a fair market value of the undamaged goods at destination less fair market value of the damaged goods. When translated into a contractual setting, these formulas fully support the position of Amstar. The *value* at destination to one who has a contract is the contract price. The fair market value formula also allows for recoupment of profit, although it is used only as an estimate for actual damages where no contract exists. Nevertheless, no shipper would ship goods to another destination if the

market price there were not greater than his cost of manufacture or wholesale price.

It is plain that Southern Pacific's position is untenable at law. It is respectfully submitted that should this court desire to enter partial summary judgment on the issue of damages, that judgment should be for $7,-529.28, representing the difference between the value of the 341 bags of sugar shipped and the value of the raw sugar reprocessed in Chalmette, Louisiana.

RESPECTFULLY SUBMITTED,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

/s/ DENNIS JOHN HAUGE
DENNIS JOHN HAUGE
Attorneys for Amstar
Corporation
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: 568-1320

*CERTIFICATE*

I hereby certify that a copy of the above and foregoing pleading has been this day forwarded to all counsel of record by depositing a copy thereof, postage prepaid, in the United States mail on this 5th day of March, 1979.

/s/ DENNIS JOHN HAUGE

(Number and Title Omitted)

*MINUTE ENTRY*

---

WEDNESDAY, MARCH 14, 1979

10. MOTION OF DEFT., SOUTHERN PACIFIC TRANSPORT CO. OF TEXAS & LA., FOR 10:00 A.M. PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF DAMAGES:

Argument held, ordered granted.

Reasons given orally by the Court.

---

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: May 3, 1979

*CONSENT JUDGMENT UPON JOINT STIPULATION OF FACTS*

This matter having been open to the Court by the attorneys for the plaintiff, Amstar Corporation, and

the defendant, Southern Pacific Transport Company of Texas and Louisiana; and the parties having entered into a joint stipulation of facts, which stipulation has been filed in this cause; and the Court having considered the stipulation of facts submitted on behalf of the parties, it is adjudged:

(1) The facts are found as stipulated;

(2) The Court has jurisdiction over the subject matter of this action under 28 U.S.C. §1337 and the Interstate Commerce Act;

(3) The Court has jurisdiction over the parties to this action;

(4) The stipulated facts support a judgment in favor of the plaintiff and judgment be and is hereby entered for the plaintiff in the sum of $488.65, together with interest at 7% per annum from the date of entry of judgment, until paid;

(5) Each party shall bear its own costs;

(6) This judgment is rendered in recognition of the reservation by the plaintiff of its right to prosecute an appeal in this action in connection with this judgment and in connection with the partial summary judgment rendered on March 14, 1979.

New Orleans, Louisiana, this 2nd day of May, 1979.

/s/ JACK M. GORDON
UNITED STATES DISTRICT
JUDGE

The undersigned agree to the entry of this judgment.

/s/ DENNIS JOHN HAUGE
DENNIS JOHN HAUGE of
Chaffe, McCall, Phillips,
Toler & Sarpy
1500 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
Attorneys for Amstar Corporation

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR. of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street — 18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorneys for Southern Pacific
Transport Company of Texas and
Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

*JOIN STIPULATION OF FACTS*

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff, Amstar Corporation, and the defendant, Southern Pacific Transport Company of Texas and Louisiana, for the purpose of the above entitled and numbered action, that the following facts are agreed upon by the parties and shall be taken as true without any evidence being produced thereon. Other and additional proof as to any fact or matter not inconsistent with the statements contained in this stipulation may be introduced by either of the parties.

I.

Amstar Corporation is engaged in the business of manufacturing sugar for sale to customers throughout the United States. Southern Pacific Transport Company of Texas and Louisiana is a common carrier by motor vehicle engaged in interstate commerce.

II.

On or about December 5, 1974, Amstar shipped 399 one hundred pound bags of sugar from Three Oaks, Louisiana, to White Swan Instant Foods at Farmers Branch, Texas.

III.

Southern Pacific was the carrier in connection with the shipment of sugar.

IV.

The bags of sugar were bed Loaded by personnel of Amstar in a trailer supplier by Southern Pacific.

V.

As indicated by the weight tickets when the sugar left Amstar's refinery, the net weight was 40,200 pounds consisting of 39,900 pounds for the 399 one hundred pound bags and 300 pounds for the tare weight of the bags at approximately one pound per bag.

VI.

The shipment was made under a standard form bill of lading.

VII.

On or about December 6, 1974, Southern Pacific attempted to deliver the sugar at Farmers Branch, but the consignee, White Swan Instant Foods, refused to accept 341 bags of the sugar because it was wet and the bags were torn.

VIII.

Immediately, on December 6, 1974, Amstar shipped 341 additional bags of sugar via Southern Pacific to White Swan Instant Foods to replace the sugar that had been refused by White Swan Instant Foods.

IX.

Amstar charged and was paid the same price on the second shipment as it would have realized on the first shipment if White Swan Instant Foods had not refused to accept delivery. No additional freight charges were incurred in connection with the second shipment.

X.

The original shipment of sugar was returned by Southern Pacific to Amstar's refinery at Chalmette, Louisiana, where Amstar reprocessed and rebagged the sugar.

XI.

The cost to reprocess and rebag the 341 bags of sugar amounted to the sum of $488.65.

XII.

The reprocessed sugar was sold by Amstar in its regular course of business.

/s/ DENNIS JOHN HAUGE
DENNIS JOHN HAUGE of
Chaffe, McCall, Phillips,
Toler & Sarpy
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Attorneys for Amstar
Corporation

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR. of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street —
18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorneys for Southern Pacific
Transport Company of Texas
and Louisiana

---

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

*JOINT MOTION FOR APPROVAL OF CONSENT JUDGMENT*

Plaintiff, Amstar Corporation, and defendant, Southern Pacific Transport Company of Texas and Louisiana, move the Court to consider the attached consent judgment, proposed by plaintiff and defendant, and for the reasons stated therein and on the basis of the attached joint stipulation of facts, to approve the same.

Amstar Corporation joins in this motion with full reservation of its right to prosecute an appeal in this action, both with respect to the attached consent judgment and with respect to the partial summary judgment granted in this action on March 14, 1979.

/s/ DENNIS JOHN HAUGE
DENNIS JOHN HAUGE of
Chaffe, McCall, Phillips,
Toler & Sarpy
1500 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
Attorneys for Amstar
Corporation

/s/ WARREN M. SCHULTZ, JR.
WARREN M. SCHULTZ, JR. of
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street —
18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorneys for Southern Pacific
Transport Company of Texas
and Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

*SATISFACTION OF JUDGMENT*

NOW INTO COURT, through undersigned counsel, comes Amstar Corporation, plaintiff in the above entitled and numbered action, and states that the judgment entered in this action on May 3, 1979, has been satisfied in full.

This Satisfaction of Judgment has been executed by Amstar Corporation with full reservation of its right to prosecute an appeal in this action in connection with the judgment entered on May 3, 1979, and in connection with the partial summary judgment rendered on March 14, 1979.

/s/ DENNIS JOHN HAUGE
DENNIS JOHN HAUGE of
Chaffe, McCall, Phillips,
Toler & Sarpy
1500 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
Attorneys for Amstar
Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

*NOTICE OF APPEAL*

Notice is hereby given that Amstar Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the judgment of the United States District Court Judge entered in this action on the 3rd day of May, 1979.

/s/ DENNIS JOHN HAUGE
DENNIS JOHN HAUGE
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY
1500 First NBC Building
New Orleans, Louisiana 70112
ATTORNEY FOR PLAINTIFF

*CERTIFICATE*

I hereby certify that a copy of the above and foregoing Notice of Appeal has been mailed this day to Warren M. Schultz, Jr., 225 Baronne Street, 18th Floor, New Orleans, Louisiana 70112, attorney for defendant.

New Orleans, Louisiana, this 8th day of May, 1979.

/s/ DENNIS JOHN HAUGE

AMSTAR CORPORATION,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY OF TEXAS AND LOUISIANA,
Defendant-Appellee.

No. 79-2243
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 1979.

---

Appeal from the United States District Court for the Eastern District of Louisiana.

Before COLEMAN, HILL and GARZA, Circuit Judges.

PER CURIAM:

Appellant seeks to raise an issue as to the proper measure of damages resulting from damage done to a shipment of sugar from appellant's factory to a customer. The shipment was transported by appellee and it was contended that the damage occurred enroute. However, because the case was ultimately resolved in

---

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

the district court, by a consent judgment, we conclude that the appeal must be dismissed.

The original complaint alleged liability and damages. Before trial, the defendant, appellee here, filed a motion for partial summary judgment as to damages. Over the plaintiff's objection, the trial judge granted a limited summary judgment, restricted the plaintiff's claim to a lesser amount of damages than the plaintiff had sought. Thereafter, the parties entered into a pretrial order in which certain facts were stipulated and certain issues of fact and issues of law were set out as being contested. According to the pretrial order a full contest remained as to whether or not the plaintiff-appellant had delivered the sugar to the carrier in good condition, whether the carrier had been guilty of any negligence at all, and whether any damage to the cargo was the carrier's fault or the plaintiff's fault. After the case had been assigned for trial the parties entered into a consent judgment upon stipulated facts resolving all of the contested issues in favor of the plaintiff-appellant and awarding the limited damages theretofore found appropriate by the court. Although the consent judgment contained a recognition that the plaintiff wished to appeal the issue of the limitation of damages, the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it. See *White & Yarborough v. Dailey*, 228 F.2d 836 (5th Cir. 1955) (Per Curiam).

The appeal is

DISMISSED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-2243

AMSTAR CORPORATION,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY OF TEXAS AND LOUISIANA,
Defendant-Appellee.

Filed: Jan. 3, 1980 _____
DEPUTY CLERK

*MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME*

Amstar Corporation moves the court for leave to file Petition for Rehearing Out of Time or until 12 January 1980, which is fourteen (14) days after counsel received notice that the Fifth Circuit had rendered a decision in this matter.

As grounds for this motion, Amstar Corporation shows that its counsel did not receive a copy of the order of dismissal or of the opinion rendered in early December 1978, that the docket sheet for the above

captioned matter has been misplaced so that service upon Amstar Corporation's counsel cannot be verified, that counsel for Amstar Corporation learned of the decision when it received a bill of costs from the Fifth Circuit on December 28, 1979 and thus investigated the matter, that counsel for Amstar Corporation requires the fourteen days provided by Rule 40(a) of the Rules of Appellate Procedure from notice of judgment in which to prepare its Petition for Rehearing.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

/s/ Corinne Morrison Hopkins
Corinne Morrison Hopkins
Dennis John Hauge
Attorneys for Amstar
Corporation
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: 568-1320

*ORDER*

Considering the above and foregoing motion,

IT IS ORDERED that Amstar Corporation be granted leave to file Petition for Rehearing Out of Time or until 12 January 1980.

New Orleans, Louisiana, this ____ day of January, 1980.

_____

JUDGE

*CERTIFICATE OF SERVICE*

I hereby certify that a copy of the above and foregoing Motion for Leave to File Petition for Rehearing Out of Time has been served upon Mr. Warren M. Schultz, Jr., 225 Baronne Street, 18th Floor, New Orleans, Louisiana 70112 by hand delivery.

New Orleans, Louisiana,

/s/ Corinne Morrison Hopkins
Corinne Morrison Hopkins

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

Filed: Jan. 21, 1980

---

Appeal from the United States District Court for the Eastern District of Louisiana

---

ORDER:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is DENIED.

/s/ JAMES C. HILL
JAMES C. HILL
U.S. CIRCUIT JUDGE

---

IN THE
SUPREME COURT OF THE UNITED STATES

---

No.

---

AMSTAR CORPORATION,
Plaintiff-Applicant,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY
OF TEXAS AND LOUISIANA,
Defendant-Respondent.

Filed: _____ _____
DEPUTY CLERK

*APPLICATION FOR EXTENSION OF TIME FOR FILING PETITION FOR CERTIORARI*

TO: THE HONORABLE LEWIS F. POWELL, JR., Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Fifth Circuit

I.

Petitioner, Amstar Corporation, through undersigned counsel, respectfully requests a thirty (30) day extension of time within which to file a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above captioned matter.

II.

Judgment was entered on December 3, 1979, but petitioner did not receive actual notice of the entry of judgment until December 28, 1979, no such notice having been forwarded to petitioner's counsel by the Court of Appeals until such date.

III.

By the time petitioner's counsel had received notice of the entry of judgment, the 14-day delay for filing a petition for re-hearing in the Court of Appeals had elapsed. Federal Rules of Appellate Procedure, Rule 40(a).

IV.

On January 3, 1980, petitioner filed a motion in the Court of Appeals to file a petition for re-hearing out of time, but such motion was denied on January 21, 1980.

V.

The time in which to file a petition for a writ of certiorari will expire, unless extended, on March 3, 1980. 28 U.S.C. 2101(c).

VI.

As grounds for this request, petitioner shows that its time for filing a petition for a writ of certiorari was effectively shortened by the failure of the Court of Appeals to notify petitioner's counsel timely of the entry of judgment and petitioner seeks this extension within which to prepare and file its petition.

VII.

The Court of Appeals dismissed petitioner's appeal from a consent judgment entered into by the parties in the United States District Court for the Eastern District of Louisiana, which consent judgment contained a recitation that petitioner wished to appeal the issue of limitation of damages, on the ground that petitioner's consent to the entry of final judgment precluded an appeal therefrom.

VIII.

The Court of Appeals erred in dismissing the appeal in reliance on *White & Yarborough v. Dailey*, 228 F.2d 836

(5th Cir. 1955) (Per Curiam).

IX.

Attached to this application for extension of time are the following documents:

a. proof of service;

b. original judgment of the United States Court of Appeals for the Fifth Circuit;

c. petitioner's Motion for Leave to File Petition for Rehearing Out of Time;

d. Order of the United States Court of Appeals denying petitioner's Motion for Leave to File Petition for Rehearing Out of Time;

e. opinion of the United States Court of Appeals for the Fifth Circuit; and

f. Consent Judgment upon Joint Stipulation of Facts.

WHEREFORE, petitioner, Amstar Corporation, prays that the thirty (30) day extension of time for filing a petition for a writ of certiorari be granted.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

---

Harry McCall, Jr.
Corinne Morrison Hopkins

Attorneys for Amstar
Corporation
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: 568-1320

*AFFIDAVIT OF SERVICE*

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: HARRY McCALL, JR., who, first being duly sworn did depose and say that on the 22nd day of February, 1980 he served a copy of the foregoing Application for Extension of Time for Filing Petition of Certiorari to Warren M. Schultz, Jr., attorney for Southern Pacific Transport Company of Texas and Louisiana, 225 Baronne Street, New Orleans, Louisiana 70112, by hand delivery.

_____

HARRY McCALL, JR.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 22nd DAY
OF FEBRUARY, 1980.

_____

NOTARY PUBLIC

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1979

No. 79-2243
Summary Calendar

D.C. DOCKET NO. 77-900 Section "I"

AMSTAR CORPORATION,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY
OF TEXAS AND LOUISIANA,
Defendant-Appellee.

---

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before COLEMAN, HILL and GARZA, Circuit Judges.

*JUDGMENT*

This cause came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby dismissed;

IT IS FURTHER ORDERED that the plaintiff-appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 3, 1979

CLERK'S OFFICE
A TRUE COPY
March 21, 1980

/s/ PAULETTA JONES
Deputy Clerk, U.S. District Court
Eastern District of Louisiana
New Orleans, La.

ISSUED AS MANDATE: Dec. 27, 1979.

Supreme Court, U. S.
FILED
JUL 18 1980
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1545

AMSTAR CORPORATION,
Petitioner,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY OF TEXAS AND LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Warren M. Schultz, Jr.
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
225 Baronne Street, 18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

Attorney for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

## TABLE OF CONTENTS

Page

Table of Contents ..... i

Table of Authorities ..... ii - iii

Statement of the Case ..... 1

Summary of Argument ..... 2

Argument ..... 3 - 8

Conclusion ..... 8 - 9

Certificate of Service ..... 10

## TABLE OF AUTHORITIES

CASES: Page

*Amstar Corp. v. Southern Pacific Transport Co.*, 607 F. 2d 1100 (5th Cir. 1979) .....5

*Kelly's Trust v. Commissioner*, 168 F. 2d 198 (2d Cir. 1948) .....8

*Martin Marietta Corp. v. FTC*, 376 F. 2d 430 (7th Cir.), *cert. denied*, 389 U. S. 923, 88 S. Ct. 237, 19 L. Ed. 2d 265 (1967) .....8

*Nashville, C. & St. L. Ry. v. United States*, 113 U. S. 261, 5 S. Ct. 460, 28 L. Ed. 971 .....3, 5, 8

*Pacific R. R. v. Ketchum*, 101 U. S. (11 Otto) 289, 25 L. Ed. 932 (1880) .....3, 4, 5, 8

*SEC v. Dennett*, 429 F. 2d 1303 (10th Cir. 1970) .....8

*Stanford v. Utley*, 341 F. 2d 265 (8th Cir. 1965) .....8

*Swift & Co. v. United States*, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587 (1928) .....3, 4, 5, 7

*Thonen v. Jenkins*, 455 F. 2d 977 (4th Cir. 1972) .....8

*United States v. Hougham*, 364 U. S. 310, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1960) .....5, 6

*White & Yarborough v. Dailey*, 228 F. 2d 836 (5th Cir. 1955) .....6, 7, 8

## TABLE OF AUTHORITIES

**CASES:** **Page**

**RULES OF COURT:**

**Sup. Ct. R. 17.1(a) (effective June 30, 1980 formerly Sup. Ct. R. 19) . . . . . .7**

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

---

No. 79-1545

---

AMSTAR CORPORATION,
Petitioner,

versus

SOUTHERN PACIFIC TRANSPORT
COMPANY OF TEXAS AND LOUISIANA,
Respondent.

---

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## STATEMENT OF CASE

Petitioner's statement of the case is correct with one minor exception. Petitioner has claimed that the amount of profit included in the sale price of the damaged sugar amounted to $7,529.28. Petitioner goes on to state that there is no dispute between the parties as to this amount. [Petition for Writ of Certiorari at 3 n. 1.] Although respondent has developed no

evidence indicating that this figure is incorrect, respondent nevertheless has not stipulated to its correctness. Petitioner is correct, however, in pointing out that there is no dispute between the parties that the cost of reprocessing the sugar for resale to another customer amounted to $488.65. Furthermore, respondent has always assumed that the amount of profit on the completed sale of sugar exceeded the sum of $488.65, even if the $7,529.28 figure should be incorrect.

Respondent was fully aware at all times that petitioner desired and intended to appeal from that portion of the consent judgment that awarded damages on the basis of petitioner's reprocessing costs. Respondent did not, however, investigate to determine whether the procedure employed was effective to preserve petitioner's rights on appeal.

## SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because the considerations governing review on certiorari indicate that there are no special and important reasons for the issuance of a writ in this case. In particular, the decision below is consistent with the prior decisions of this Court and is consistent with the prior decisions of other courts of appeals. Moreover, the lower court has not so far departed from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision.

## ARGUMENT

### I. The decision below does not conflict with prior decisions of this court.

Petitioner incorrectly argues that the decision below conflicts with prior decisions of this Court. In fact, the cases referred to by petitioner stand for the general proposition that "a decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause." *Swift & Co. v. United States*, 276 U. S. 311, 324, 48 S. Ct. 311, 314, 72 L. Ed. 587, 596 (1928); *Nashville, C. & St. L. Ry. v United States*, 113 U. S. 261, 266, 5 S. Ct. 460, 462, 28 L. Ed. 971, 973 (1895). *See Pacific R. R. v. Ketchum,* 101 U. S. (11 Otto) 289, 295, 25 L. Ed. 932, 935 (1880).

Petitioner suggests that the three cases cited above involved a review by this Court of consent judgments entered by the lower courts. On the contrary, the *Nashville* decision involved a review of the lower court's dismissal of the lawsuit. The suit was dismissed on the grounds that a consent judgment entered in an earlier proceeding between the parties barred the plaintiff's claim, and this Court affirmed the dismissal. This Court did not review the consent judgment itself, nor did any of the parties contend that there was a lack of actual consent to that judgment.

The *Swift & Co.* decision involved a review of the lower court's denial of two motions to vacate a consent judgment, which motions had been filed more than four years after the entry of the consent judgment. None of the parties in that case contended that there was a lack of actual consent to the judgment, but contended only that the judgment should be vacated for lack of jurisdiction. This Court affirmed the denial of the motions to vacate and did not review the consent judgment itself, other than to the extent that it was necessary to do so to determine whether the lower court had jurisdiction.

In *Ketchum*, this Court affirmed the decree below, but without actually reviewing the terms of the consent decree itself. The most serious issue on appeal was, once again, whether the lower court had jurisdiction to enter the consent judgment. The appellant in *Ketchum* did, however, assert that there was a lack of actual consent to the judgment on the grounds that its solicitor had no authority to consent to the judgment on behalf of the appellant. This Court held that where it appeared on the record that the appellant had consented to the judgment, any relief based upon a lack of actual consent would have to be obtained in the court of first instance.

In the present case, petitioner freely acknowledges that it consented to the entry of the judgment below and that the trial court had jurisdiction to enter the judgment. Petitioner contends only that its consent was limited by an express reservation of its right to appeal from the judgment. In *Ketchum*,

this Court held that a right of appeal exists with respect to a consent judgment that is otherwise appealable. *Pacific R. R. v. Ketchum,* 101 U. S. (11 Otto) 289, 295, 25 L. Ed. 932, 935 (1880). The Court further held that even though a right of appeal exists, the judgment must be affirmed where it appears from the record that the appellant consented to the judgment.

Accordingly, the decision below is consistent with the holding in *Ketchum* and with the dicta in *Swift & Co.* and *Nashville.*

Petitioner goes on to suggest that the decision below conflicts with this Court's decision in *United States v Hougham,* 364 U. S. 310, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1960). The rule in *Hougham* is that acceptance of the benefits of a judgment does not preclude an appeal on the grounds that the judgment was inadequate. In the present case, respondent has paid the judgment in full and a satisfaction of judgment has been made a part of the record.

The decision below makes no reference to the fact that petitioner has accepted any benefits under the judgment. There is no indication that this factor influenced the court of appeals in any respect in its deliberations. The decision below was predicated solely upon "the fact that both parties freely consented to the entry of a final judgment." *Amstar Corp. v. Southern Pacific Transport Co.,* 607 F. 2d 1100 (5th Cir.

1979). Accordingly, there is no inconsistency with the *Hougham* decision.

## II. The decision below does not conflict with the decisions of any courts of appeals, including the Court of Appeals for the Fifth Circuit.

Petitioner argues that the decision below conflicts with the decisions of several of the courts of appeals, including the Court of Appeals for the Fifth Circuit, insofar as the decision rests upon petitioner's acceptance of benefits under the judgment. This is indentical to the argument advance by petitioner with respect to the *Hougham* decision. As shown above, there is no reference by the court below to the fact that petitioner received any benefits under the judgment. The court below based its decision on the fact that the parties had consented to the entry of the judgment.

Petitioner has emphasized that the court below referred to the case of *White & Yarborough v. Dailey*, 228 F. 2d 836 (5th Cir. 1955), in its opinion. Petitioner correctly points out that the *Dailey* decision was based in part upon the fact that the appellant had accepted certain benefits under the judgment. In *Dailey*, however, the court squarely held that "Appeals cannot be taken from agreed judgments such as this one was, and, for that reason alone, the appeal fails." *Id.* at 837. Since the court below in the present case made no reference to the fact that the judgment had been paid, it should be obvious that

the court relied upon the *Dailey* decision because of the statement just quoted, and not because of any reference to the appellant's acceptance of benefits under the judgment.

## III. The court below has not so far departed from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision.

Petitioner argues that the decision below is clearly erroneous because petitioner would not have consented to the entry of judgment in the absence of a reservation of its right to appeal. The question at this point, however, is not whether the court of appeals has carried into effect the intent of the parties, but whether the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a) (effective June 30, 1980, formerly Sup. Ct. R. 19). Petitioner has failed to show such a departure from the accepted and usual course of judicial proceedings in this instance.

Irrespective of the parties' actual intent, where it appears from the record that the parties have consented to the entry of a judgment, the judgment must be affirmed on appeal provided the lower court had jurisdiction to enter the judgment and provided was no fraud in its procurement. *Swift & Co. v. United States*, 276 U.S. 311, 48 S. Ct. 311, 72 L. Ed. 587

(1928); *Nashville, C. & St. L. Ry. v. United States,* 113 U.S. 261, 5 S. Ct. 460 28 L. Ed. 971 (1895); *Pacific R. R. v. Ketchum,* 101 U.S. (11 Otto) 289, 25 L. Ed. 932 (1880); *Thonen v. Jenkins,* 455 F.2d 977 (4th Cir. 1972); *SEC v. Dennett,* 429 F. 2d 1303 (10th Cir. 1970); *Martin Marietta Corp. v. FTC,* 376 F.2d 430 (7th Cir.), *cert. denied,* 389 U.S. 923, 88 S. Ct. 237, 19 L. Ed. 2d 265 (1967); *Stanford v. Utley,* 341 F.2d 265 (8th Cir. 1965); *White & Yarborough v. Dailey,* 228 F.2d 836 (5th Cir. 1955); *Kelly's Trust v. Commissioner,* 168 F.2d 198 (2d Cir. 1948).

The decision by the court of appeals in this case does not represent a departure from the foregoing rule, and this Court's power of supervision therefore should not be invoked.

## CONCLUSION

Petitioner has failed to show that there are special and important reasons in this case for reviewing the decision below on writ of certiorari. More particularly, the question has already been settled by this Court; the decision by the court of appeals does not conflict with a decision of this Court, nor does it conflict with the decision of another federal court of appeals on the same matter; and the court of appeals has not so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WARREN M. SCHULTZ, JR.
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Barone Street, 18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

Attorney for Respondent

## CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of July, 1980, three copies of the foregoing brief were hand delivered by undersigned counsel to Harry McCall, Jr., of Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First NBC Building, New Orleans, Louisiana 70112, counsel for petitioner.

---

WARREN M. SCHULTZ, JR.